NO. 92-1359

Supreme Court, U.S.
FILED
MAR 11 1993
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DARRYL LEWIS
PLAINTIFF-PETITIONER

VERSUS

SOUTH CAROLINA FREIGHT AND
SOUTH CENTRAL BELL
RESPONDENTS

Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES - RULE 29.1 LISTING

Carolina Freight Corporation is the parent corporation of Carolina Freight Carriers. The following are subsidiaries of Carolina Freight Corporation:

Carolina Freight Canada, Limited
Complete Leasing Concept
Cardinal Freight Carriers
Carrier Computer Services, Inc.
G. I. Trucking
Innovative Logistics, Inc.
Red Arrow Freight Lines

QUESTIONS PRESENTED

1. Whether this Court may grant an extraordinary writ where the issues presented are not novel and are not of great public import so as to warrant intervention by this Court?

2. Whether issues not raised in courts below are subject to review by this Court?

TABLE OF AUTHORITIES

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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

IN RE: DARRYL LEWIS AND FLORENCE WHITE
PETITIONERS

VERSUS

ALVIN CALICE, SOUTH CAROLINA FREIGHT,
XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL,
AND
NEW ORLEANS PUBLIC SERVICE
RESPONDENTS

Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

Respondent, Carolina Freight Carriers, Inc. (hereinafter "Carolina Freight"), respectfully requests this Court to deny the petition for extraordinary writ asking this Court to reverse the judgment and opinion of the Louisiana Court of Appeal for the Fourth Circuit and to re-enter the trial court's judgment.

COURSE OF PROCEEDINGS BELOW

On March 6, 1985, petitioner filed suit in the Civil District Court for the Parish of Orleans against respondent, Carolina Freight, Alvin Calice, South Central Bell and New Orleans Public Service. Petitioner sought damages for injuries allegedly sustained from being hit by a falling telephone pole.

A jury trial was held on April 15-18, 1991. The jury found for the petitioner and awarded $135,800 in damages. The trial court entered judgment on the jury verdict on April 22, 1991. (Appendix A) Thereafter, Carolina Freight and South Central Bell filed suspensive appeals to the Louisiana Fourth Circuit Court of Appeal.

The Court of Appeal overturned the award, finding that petitioner failed to adduce any evidence that the injuries were caused by respondents' actions and therefore the jury verdict was clearly erroneous. (Appendix B) Petitioner, in turn, filed a request for rehearing to the Court of Appeal, which was denied.

Petitioner then filed an application for writs of certiorari and review to the Louisiana Supreme Court, which the Court denied on November 13, 1992. (Appendix C)

RESPONDENT'S STATEMENT OF THE CASE

This case arises out of an accident that allegedly occurred on December 10, 1984. Petitioner testified that while he was working on a car, a telephone pole struck the back of the car and then hit his head. The telephone pole was pulled down by the top of a Carolina Freight truck that had snagged a South Central Bell wire hanging below the required height.

According to petitioner, his body was three-quarters of the way in the car, when he heard a noise, began to move upright, and was hit by the telephone pole. As a result, petitioner complained of cervical problems and an inability to work. He was diagnosed by Dr. Stuart Phillips as having a herniated cervical disc, despite a negative CT scan and negative MRI.

Evidence adduced at trial demonstrated that petitioner had been involved in numerous accidents both before and after the telephone pole incident. He sought medical care following each accident and filed three suits seeking damages for these injuries. (See Appendix B, Court of Appeal decision, p. 7.) The Court of Appeal found that none of petitioner's treating physicians was ever given a complete medical and factual history, nor did they know that petitioner had been involved in accidents other than the one for which each treated him.

In reversing the jury verdict, the Court of Appeal concluded that there was nothing contained in the record, other than petitioner's bald assertions, to show that the alleged injuries were the result of the telephone pole incident; and that because petitioner had deceived his treating physicians by failing to tell them of his other accidents, any medical opinion ventured on causation was unreliable.

REASONS FOR DENYING WRIT

A. Petitioner is not entitled to the granting of an extraordinary writ.

This Court is empowered by 28 U.S.C. §1651 to "issue all writs necessary or appropriate in aid of the respective jurisdictions and agreeable to the usages and principles of laws." Because an extraordinary writ is an extreme remedy, this Court has stressed that it should only be invoked "in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402, 96 S.Ct. 2119 (1976). Only exceptional circumstances amounting to a judicial usurpation of power justify the imposition of this extraordinary remedy. DeVeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133 (1945). Traditionally, federal courts have used the power "only to confine inferior courts to their lawful jurisdiction or to compel them to exercise authority when they have a duty to do so." Will

v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 273 (1976).

In determining whether to issue an extraordinary writ, this Court has focused on whether the petitioner has other "adequate means to attain the [desired] relief," and whether the petitioner has met "the burden of showing that [his] right to the writ is 'clear and indisputable.'" Kerr, 426 U.S. at 403, 96 S.Ct. at 2124. Both prerequisites must be met before the Court can consider the merits of the writ request. Kerr, 426 U.S. at 403, 96 S.Ct. at 2124.

As to the instant case, petitioner has failed to show that he has a clear and indisputable right to the issuance of a writ.

1. Petitioner's case does not present matters of great public import so as to warrant the issuance of an extraordinary writ.

The issues presented by petitioner's application are not matters of "public importance" and do not justify the issuance of an extraordinary writ. Ex Parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793 (1943). The issues presented by petitioner are not novel, but are simply those of a disappointed litigant in a personal injury lawsuit, whose lack of candor to his physicians, caused the appellate court to overturn an erroneous jury award. Further, the Court of Appeal's decision only affects the parties to this litigation and has no ramifications beyond the instant case.

Petitioner claims that the Court of Appeal cannot overturn a jury verdict based on credibility or lack thereof of a witness. However, the Court, relying on the Louisiana Supreme Court case of Rosell v. Esco, 549 So.2d 840 (La. 1989), held that where objective evidence so contradicts a witness' story, or the story itself is so internally inconsistent that a reasonable fact finder would not credit the witness's story, an appellate court may overturn a jury verdict. Clearly, the Court of Appeal was within its legal authority by reversing a jury verdict that was not

supported by the evidence. Dofflemyer v. Gilley, 384 So.2d 435 (La. 1980).

In an attempt to bolster his position, petitioner points to what he calls a "narrative of extraordinary circumstances." (Page 21 of petitioner's writ application.) In this narrative, petitioner recounts what he believes to be an improper meeting between Nancy Marshall, counsel for Carolina Freight Carrier, and Judge Schott of the appellate court. Petitioner attempts to use this alleged meeting as additional grounds for the granting of an extraordinary writ.

First, petitioner cannot, at the eleventh hour, raise the issues presented by the "narrative." Issues not presented to or considered by the state Supreme Court cannot be considered by this Court. Carter v. Kentucky, 101 S.Ct. 1112, 450 U.S. 288 (1981). Because petitioner never raised these circumstances in his writ to the Louisiana Supreme Court, this Court should not consider them.

Second, even if this Court can review this issue, the allegations are without merit. Respondent submits the affidavit of Nancy J. Marshall attesting to the fact that she was not jogging in the park on May 2, 1992 with Judge Schott. (Appendix D) Nancy J. Marshall further attests to the fact that other than appearing before Judge Schott on two occasions, when there were oral arguments in this case, she has never met him.

Petitioner's attempt to falsely inject into these proceedings "extraordinary circumstances" underscores the petitioner's desperation and the absence of grounds to support the granting of an extraordinary writ.

B. Petitioner is not entitled to the granting of a writ of certiorari.

Finally, even if this Court categorizes petitioner's application as one for a writ of certiorari, it still does not present issues that warrant the triggering of review. Supreme Court Rule 10

provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A writ of certiorari will be granted only when there are special and important reasons." Sup. Ct. R. 10.

Rule 10 lists three circumstances which justify issuance of a writ of certiorari; none of which are present in the instance case. Petitioner has not alleged that "important questions of federal law" were decided nor that the Louisiana Supreme Court "decided a federal question in a way that conflicts with the decisions of other state courts of last resort or of a United States Court of Appeals." Sup. Ct. R. 10. Rather, Petitioner's application only raises issues of Louisiana state law.

It is well established that where a state court judgment rests on independent and adequate state grounds, a writ of certiorari should be denied since the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights. Zacchini v. Scripps-Howard Broadcasting Co., 97 S.Ct. 2849, 433 U.S. 562 (1977). Clearly, the circumstances presented by petitioner's application do not justify issuance of a writ of certiorari.

CONCLUSION

Because petitioner has failed to establish that he has a clear and indisputable right to the issuance of an extraordinary writ or that grounds exist for granting a writ of certiorari, respondent respectfully requests that the writ application be denied.

Respectfully submitted,

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APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NUMBER 85-3807 DIVISION "B" DOCKET NO. 4

DARRYL LEWIS AND FLORENCE WHITE
vs
CAROLINA FREIGHT CARRIERS CORP. AND
SOUTH CENTRAL BELL

JUDGMENT

This matter came on for trial by jury on April 15, 16, 17 and 18, 1991:

Present: Gail Nelson, Esq., attorney for and Darryl Lewis;
Larry Centola, Esq., attorney for South Central Bell;
Nancy Marshall, Esq., attorney for Carolina Freight, Inc.

and the following jurors:

Valinder Addison	Wanda Bailey
Ethen A. Crawford	Stephen S. Decker
Hilda Williams	Lovie Encalade
Dolores Evans	Brenda Nunnery
Maude Parker	Patricia Scott
Pamela Smith	Marigold Taylor

After considering the pleadings, the evidence, the argument of counsel, and the law and in compliance with the jury verdicts;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Darryl Lewis

and against Carolina Freight Carriers Corp. and South Central Bell in solido to the extent of 25% against Carolina Freight Carriers Corp. and 75% against South Central Bell as follows: general damages in the sum of $37,500.00; past medical expenses in the sum of $5,300.00; future medical expenses in the sum of $600.00; past lost wages in the sum of $62,000.00; and future lost wages in the sum of $25,000.00 all with interest from the date of judicial demand until paid and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants be case for the expert witness fees as follows: Dr. Stuart Phillips, in the sum of $500.00; Dr. Rauchwerk in the sum of $200.00; and Dr. Wolfson in the sum of $300.00.

New Orleans, Louisiana, the 22nd day of April, 1991.

_____

Robert A. Katz, Judge

APPENDIX B

DARRYL LEWIS AND	
FLORENCE WHITE	* No. 91-CA-2145
	*
	* COURT OF APPEAL
VS	
	* FOURTH CIRCUIT
ALVIN CALICE, SOUTH	*
CAROLINA	*
FREIGHT, XYZ INSURANCE	*
COMPANY,	*STATE OF LA
SOUTH CENTRAL BELL, AND	*
NEW ORLEANS PUBLIC	*
SERVICE	*

* *

APPEAL FROM CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 85-3807, DIVISION "B"
HONORABLE ROBERT A. KATZ, JUDGE

MOON LANDREAU
JUDGE

(Court composed of Chief Judge Patrick M. Schott, Judge Charles R. Ward, Judge Charles R. Jones, Judge Miriam G. Waltzer and Judge Moon Landrieu) Jones, J., dissents

Gail M. Nelson
New Orleans, Louisiana
Attorney for Plaintiff/Appellee

Nancy J. Marshall
Deutsch, Kerrigan & Stiles
New Orleans, Louisiana
Attorney for Defendant/Appellant
Carolina Freight Carriers Corp.
Lawrence J. Centola, Jr.
Robert J. Burns, Jr.
Hoffman, Sutterfield, Ensenat & Bankston
New Orleans, Louisiana
Attorney for Defendant/Appellant
South Central Bell

COURT OF APPEAL, FOURTH CIRCUIT
FILED
DANIELLE SCHOTT **REVERSED**
CLERK OF COURT

This appeal arises from an award for alleged personal injuries sustained in an accident.

On December 10, 1984, on Burdette Street in New Orleans, Louisiana, Darryl Lewis was repairing his mother's automobile when a Carolina Freight truck being driven by Alvin Calice caught a low hanging South Central Bell wire, causing the pole to which the wire was attached to fall. It is undisputed that the pole hit the automobile upon which Lewis was working.

Lewis filed suit against Calice, South Central Bell, Carolina Freight, XYZ Insurance Company, and New Orleans Public Service for injuries allegedly sustained as a result of the accident. The case was tried by a jury which awarded plaintiff general damages in the amount of $37,000.00, past medicals of $5,000.00, future medicals of $6,000.00, past lost wages of $62,000.00 and future lost wages of $25,000.00. Liability was allocated 25% to Carolina Freight and 75% to South Central Bell. Carolina Freight and South Central Bell have appealed.

Immediately following the accident, plaintiff was met by paramedic Henry Holmes at the scene of the accident. Holmes testified that he found plaintiff lying on his back on the ground, conscious and alert, complaining of back pain. Plaintiff told the paramedic that the pole hit the car while he was inside it, but did not actually hit him. Holmes found no obvious sign of trauma. The plaintiff was transported to Ochsner Hospital. No objective signs of injury were found.

The plaintiff told Ochsner physicians that he struck his forehead on the steering wheel after the car was hit by a falling telephone pole. He stated that he was thrown out of the care, hitting his right shoulder, back and hand. He told the doctors that he had no prior neck or head injuries. By the time of trial, plaintiff's account of the accident had changed to allege that the pole first hit the car, then his head and left shoulder knocking him unconscious until he awoke at the hospital in a dazed state. Plaintiff's medical history is as follows.

In December of 1983, plaintiff was admitted to Ochsner Hospital for back problems and pain in the left side of his neck. The record is silent as to the origin of the pain.

On December 4, 1984, just six days before the accident at issue, he was involved in an automobile accident. Two days after that accident, he sought treatment from Dr. Landry, an orthopedic surgeon, complaining of neck, shoulder and wrist pain. Landry diagnosed a strained neck and shoulder. The plaintiff again saw Landry on the 13th of December. He told the doctor that he had gone to Ochsner on the 10th because his shoulder injury from the 4th was bothering him. He had his x-rays from the 10th sent to Landry. He never mentioned the accident with the pole. Landry stated that the plaintiff's complaints were difficult to interpret because they could not be correlated with any part of his anatomy. There were no objective findings of injury.

Plaintiff was examined by Dr. Konlee on December 19, 1984 for the pole accident. Konlee found no signs of spasm or any other objective sign of injury.

In January of 1985, while he was seeing Landry for the automobile accident of December 4th, plaintiff sought treatment from Dr. Cracco, also an orthopedic surgeon. Plaintiff complained to Cracco of low back and neck pain due to an accident where a pole fell on his back. The doctor found no spasm, no neurological or physical abnormality and no atrophy or muscle weakness. The diagnosis was a mild cervical and lumbar strain based on subjective complaints. Cracco found that the plaintiff could resume work in three weeks. He saw the plaintiff again in April and found him to be normal.

Unbeknownst to his physicians, plaintiff had resumed work as a driver for Orleans Auto Parts in January of 1985, where he remained employed until he was involved in another automobile accident, discussed below.

On May 8, 1985, plaintiff was involved in an auto accident during his employment with Orleans Auto Parts. He sought treatment from Dr. Borgran, a general surgeon. Plaintiff complained of neck and knee injury with attendant headaches and neck pain. Examination revealed no objective sign of injury and plaintiff displayed a full range of neck motion.

On May 16, 1985, plaintiff sought treatment from Dr. Rauchwerk, an orthopedic surgeon, for alleged injuries stemming from the pole accident of December 10th. No objective signs of injury were found. Plaintiff did not tell the doctor of his auto accident of eight days before. Rauchwerk last examined plaintiff on September 16, 1985, discharging him "with full benefit from orthopedic treatment with no residual loss of function or stability."

Plaintiff was involved in yet another automobile accident on January 15, 1986. On this same date he returned to Dr. Bogran complaining of pain in his neck, back, knees, left shoulder and left and attendant headaches. Bogran found his neck to be free

of pain, but for the first time detected a muscle spasm in the lower back. He diagnosed the problem as being caused by the recent automobile accident. Plaintiff was discharged from his care in July of 1986 with no limitations.

In April of 1986, plaintiff began treatment with Dr. Phillips, an orthopedic surgeon, for alleged injuries of December 10th, 1984. Phillips was not informed of any other accidents, either before or after the December 10th, 1984 incident. Plaintiff complained of pain in his neck and back. Mild spasm was found in the neck. Based on a diagnostically questionable procedure known as a discogram, Phillips diagnosed plaintiff as suffering from a herniated nucleus pulposus, an injury to the ligament which holds the disk in place. However, Phillips also testified that it doesn't take long for a spasm to show up, usually the next day and rarely any later than two weeks. He stated that it was highly unusual that no muscle spasm was found by Konlee in his December 19, 1984 examination if indeed the injury had occurred nine days before that examination. Regarding causation of plaintiff's injuries, Phillips stated that he relied on the truthfulness that the plaintiff was injured on December 10th, 1984 and that if the history given was incorrect, his diagnosis as to causation would be incorrect. On August 29th, 1986, plaintiff was seen by Dr. Laborde, Chairman of Department of Orthopedics at Touro Hospital. Plaintiff complained of pain from the telephone pole accident, upon examination, Laborde found a very muscular man, indicative of an individual who engaged in significant physical activity. There was no muscle atrophy. He administered a CAT scan and an MRI and found no indication of a herniated cervical disk. Laborde testified that in his four and one-half years of examining the plaintiff, he never found evidence of a muscle spasm. There was no objective findings of injury. The doctor opined that the complaints were psychological in origin as there was no orthopedic explanation.

It is important to note that none of these treating physicians were ever given plaintiff's complete medical and factual

history. The many treatments overlapped, yet the doctors did not know that the plaintiff had been treated elsewhere nor did they know that he had been involved in any accident other than that for which they were treating him. Plaintiff filed lawsuits in connection with three of the four above mentioned accidents, and settled another prior to suit. He does not deny that he deceived his doctors and asserts that he did so at the instruction of his former attorney.

The plaintiff in a personal injury suit must prove by a preponderance of the evidence fault, causation, and damage. LSA-C.C., art. 2316. He must prove that the defendant was negligent and this negligence caused the plaintiff's damage. Such proof need only be by a preponderance of the evidence. Walton v. Wolfe, 406 So.2nd 169 (La. 1981); Guillory v. Avondale, 448 So.2nd 1281 (La. 1984). This court may not disturb the jury's findings of fact unless it constitutes manifest error or is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact will not be disturbed upon review. Rosell v. ESCO, 549 So.2nd 840 (La. 1989). However, where objective evidence is so internally inconsistent that a reasonable fact finder would not credit the witness' story, this court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. Rosell, supra. In the instant case, even assuming that plaintiff has suffered an injury as found by Phillips, we find that the plaintiff has failed to prove causation between that injury and defendant's action.

Because plaintiff deceived his treating physicians concerning his medical history, any diagnosis as to causation would be unreliable. In the words of Dr. Phillips, if the history were incorrect the diagnosis would be incorrect. The plaintiff asserts that the injury found by Dr. Phillips, a herniated disk, was caused by the falling telephone pole on December 10, 1984. However, plaintiff has been treated on five known occasions for neck and

back pain. There is nothing contained within this record, other than plaintiff's bald assertion, to show that the alleged injuries were the result of the defendant's actions. The plaintiff has admittedly been deceptive and untruthful to both his physicians and parties during the course of litigation, including testimony given under oath in this case.

It is clear from the record in this matter that the plaintiff failed to produce any evidence that his injuries were caused by the defendant's actions. Therefore, we find that the jury verdict was clearly wrong and reverse the judgment below.

REVERSED

DARRYL LEWIS AND FLORENCE WHITE	*No. 91-CA-2145
	*
	*COURT OF APPEAL
vs	*
	*FOURTH CIRCUIT
ALVIN CALICE, SOUTH CAROLINA	*
FREIGHT, XYZ INSURANCE COMPANY,	*STATE OF LA
SOUTH CENTRAL BELL, AND NEW ORLEANS PUBLIC SERVICE	*

* * * *

APPENDIX C

THE SUPREME COURT OF THE STATE OF LOUISIANA

DARRYL LEWIS AND
FLORENCE WHITE
vs. NO. 92-C-2495

ALVIN CALICE, SOUTH CAROLINA
FREIGHT, XYZ INSURANCE COMPANY,
SOUTH CENTRAL BELL AND NEW
ORLEANS PUBLIC SERVICE

IN RE: Lewis, Darryl: White, Florence: - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 91CA-2145; Parish of Orleans Civil-District Court Div. "B" Number 85-3807

November 13, 1992.

PFC

DENIED

WFM
JLD
JCW
HTL
LFC
PH

APPENDIX D

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned notary, personally came and appeared Nancy J. Marshall, who, being deposed stated that:

1. She is the attorney of record for Carolina Freight Carriers in the matter entitled "Darryl Lewis, et al. versus Alvin Calice, Southern Carolina Freight, et al." which is currently before the United States Supreme Court on an application for extraordinary writ.

2. She was trial counsel for Carolina Freight Carriers, as well as counsel during the appellate process of the Louisiana Appellate Courts.

3. In May of 1992, after the initial May 8 hearing before a three judge panel of the Court of Appeal, she was walking in Audubon Park with her husband, Stephen Rosencrans. Upon seeing Mr. Lewis, she pointed him out to her husband as being a plaintiff involved in a case that had been ongoing for seven years, and began laughing about the fact that he had allegedly had a herniated disc and yet was able to chin himself on the exercise bars in Audubon Park.

4. While discussing this matter with her husband, Mr. Lewis looked up and she said "Hello, Darryl" to him.

5. She has never met Judge Scott prior to the hearing of this case in the appellate court, and at no time discussed this case with him prior to the appellate court's decision in August 5, 1992.

_____

NANCY J. MARSHALL

Sworn to and subscribed
before me this 8th day of
March, 1993.

[s]_____
NOTARY PUBLIC